(13)

NO 87-1241



IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1987

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COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

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On Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

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# REPLY BRIEF FOR PETITIONER

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## ARGUMENT

### I. CONGRESS, IN ENACTING AND AMENDING CERCLA, DID NOT INTEND TO SUBJECT UNCONSENTING STATES TO LIABILITY TO PRIVATE PARTIES.

1. As discussed in Pennsylvania's opening brief, nothing in CERCLA,[1] as originally enacted, approaches the "unmistakably clear" statement of Congressional intention which the Court has held is necessary to affect the States' Eleventh Amendment immunity. Br. for Pet., p. 15-18; see Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). To the contrary, even the Court of Appeals conceded that CERCLA was "almost identical"

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[1]Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq.



to the statute[2] involved in Employees of Dept. of Public Health and Welfare v. Missouri Department of Health and Welfare, 411 U.S. 279 (1973), where the Court held that Congress had expressed no such intention. Pet. App. 100a. CERCLA, like the statute involved in Employees, was intended to make local governments and other actors liable to any injured party, but to make the States liable only to the United States. See 42 U.S.C. § 9607(a)(1)(A); Employees, supra, at 285-86.

CERCLA had established a standard of strict liability, that is, liability without regard to fault. 42 U.S.C. § 9607(b); H.R.Rep. No. 99-253(I),

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[2]The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

99th Cong., 2d Sess, 74, reprinted in 1986 U.S. Code Cong. & Adm. News 2835, 2856. In the legislation known as SARA[3], however, Congress modified this standard to limit the liability of state and local governments, by providing that in certain cases--specifically, where a state or local government had acquired a polluting facility involuntarily--the government unit would be liable only if it was at fault with regard to the pollution; SARA, § 101(b), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988); see Br. for Pet., p. 18-19. Before SARA, a State was strictly liable, but only to the United States. After SARA, a State is still liable only

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[3]Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986).



to the United States, but now may assert, in the appropriate circumstances, the defense that it is not at fault. SARA's change in the standard of liability thus did nothing to decrease CERCLA's resemblance to the statute construed in Employees, and certainly nothing in SARA comes close to meeting Atascadero's "clear statement" rule.

In arguing otherwise, Union Gas essentially repeats the arguments made by the Court of Appeals. Br. for Resp., p. 9-14. Pennsylvania has already responded to these convoluted and unconvincing arguments in its opening brief, Br. for Pet., p. 15-27, and will not repeat that material here. Worth noting, however, are some of the things Union Gas does not say.

First, Union Gas makes no real effort to distinguish the statute here

from the statute at issue in Employees, or to explain why similar statutes should receive the dissimilar construction it espouses. Second, Union Gas makes no attempt to support its assertion that Congress was dissatisfied with the Court of Appeals' first decision in this case, and "surgically" crafted SARA in response to it. Br. for Resp. p. 13-14. There is in fact no evidence that Congress was thinking about Union Gas I when it drafted SARA;[4] and there is for that matter no evidence that

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[4]Union Gas tries to explain away this dearth of evidence by positing that Congress lacks "the time or the capacity" to specifically discuss the decision of a mere Court of Appeals. Br. for Resp., p. 13, n.5. This, of course, is not the case, as SARA's legislative history shows. See H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., 74, reprinted in 1986 U.S. Code Cong. & Adm. News 2835, 2856 (discussing favorably the decision in United States v. Chem-Byne Corp., 572 F.Supp. 802 (S.D. Ohio 1983)).



Congress was thinking about the Eleventh Amendment at all. All of the relevant legislative history shows that Congress wanted to limit governmental liability, not expand it. See Br. for Pet., p. 20. Finally, Union Gas makes no effort to explain the contrast between the language in SARA and the language in the Rehabilitation Act Amendments of 1986, where Congress certainly was thinking about the Eleventh Amendment. See Br. for Pet., p. 26-27.

2. Union Gas, however, relies heavily on what it sees as CERCLA's purpose, as opposed to CERCLA's language. Br. for Resp., p. 6-9, 14-16. Union Gas argues that if private parties cannot sue the States for their cleanup costs, they will be reluctant to undertake voluntary cleanup efforts, while the States for their part will likewise

resist voluntary cleanups, in the hope that some private party will be forced to bear the costs. All of this, Union Gas says, is contrary to Congress' purpose in enacting a "comprehensive" statute. Br. for Resp., p. 15.

The short answer to this, of course, is that the best guide to Congress' purpose is Congress' language. Congress was well aware of the decision in Employees when it enacted the "almost identical" scheme in CERCLA, and was well aware of the decision in Atascadero when it enacted SARA. Congress knows well enough how to address the Eleventh Amendment when it wants to, but in the language of CERCLA and SARA Congress showed no disposition to do so.



Union Gas' argument also fails to recognize that under CERCLA States pay a substantial share of cleanup costs even when they are not involved in the underlying pollution. CERCLA requires that States pay 10% of the costs incurred by the federal government for remedial actions at privately owned facilities, 42 U.S.C. § 9604(a)(3)(C)(i); at least 50% of the federal response costs for releases from facilities owned by States or their political subdivisions, 42 U.S.C. §9604(c)(3)(C)(ii);[5] plus the entire cost of the future maintenance of removal and remedial actions for all

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[5]In other words, as to this 50% the States do not have available even the limited defenses allowed by CERCLA. See , e.g., 42 U.S.C. § 9607(b)(listing allowable defenses).

facilities; 42 U.S.C. § 9604(a)(3)(A).[6] It is thus inaccurate to suggest that the absence of liability to private parties gives States a "free ride" that discourages both States and private parties from voluntary cleanups.

Certainly, this theory bears no relation to the facts of this case. Union Gas claims to have proceeded all along on the assumption that it could recover its costs from Pennsylvania's treasury, yet this expectation did not spur Union Gas to a voluntary cleanup. It was the United States, not Union Gas, which cleaned up Brodhead Creek, and it is Pennsylvania, not Union Gas, which is continuing the remedial activities there. Br. for Resp., p. 3-4.

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[6]In theory, of course, some of these costs are recoverable from responsible private parties. In practice, however, these parties will often be dead, dissolved or insolvent.



The real incentive for voluntary action under CERCLA is not the prospect of recovery from a third party --which, as a practical matter, will often be unavailable anyway--but the threat of having to pay for costly remedial actions by the federal government. Union Gas, which was not moved to action even by this threat, is in no position to question the wisdom of Congress in not opening the State treasuries to private lawsuits.

## II. HANS V. LOUISIANA WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED.

In Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that an unconsenting State cannot be sued in the federal courts by one of its own citizens, even if the case arises under the Constitution and laws of the United States. The Court based its holding, not so much on the Eleventh Amendment as such, but on the Constitution as it stood even before the Eleventh Amendment was adopted: "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." Id., at 15. As the Court has many times explained,

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex parte New York, No. 1, 256 U.S. 490, 497 (1921)(citations omitted), quoted in Atascadero State Hospital v. Scanlon, 473 U.S. at 239, n.2. Hans, and the long line of cases that follow it, establish not just a principle of State sovereign immunity but a structural principle of

federalism that recognizes the vital role of the States in our federal system. "A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984)(footnote omitted, emphases in original).

In the century since it was decided, "the fundamental principle enunciated in Hans has been among the most stable in our constitutional jurisprudence." Welch v. Dept. of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 17 (plurality opinion). See Atascadero State Hospital v. Scanlon, supra, at 243-44, n.3 (collecting cases). Nevertheless, Union Gas and its amici ask the Court, for the fifth time in three years, to re-examine Hans and its progeny. Br. for Resp., p. 16-25. "Once again, [they] have placed in issue the fundamental nature of our federal system." Welch, supra, slip op. at 10 (plurality opinion). Union Gas and its amici base their argument on 1) the asserted incorrectness of Hans on the basis of the historical record and 2) the asserted "pernicious" effects that Hans has produced, Br. for Resp., p. 25. They are wrong on both counts.

A. Hans Was Correctly Decided.

The historical and legal underpinnings of the decision in Hans have been exhaustively recounted on many occasions, and there is no need to repeat that material here. See, e.g.,

Welch, supra, slip op. at 11-16 (plurality opinion); Edelman v. Jordan, 415 U.S. 651, 600-662; Hans, supra, at 12-14. Pennsylvania here reviews only the main headings of that support:

1. The text of Article III of the Constitution is at least as supportive of Hans as not. Article III, Section 2 extends the federal judicial power to all cases arising under the federal Constitution, laws and treaties, and (before the Eleventh Amendment) to controversies "between a State and citizens of another State." The questions is whether these grants were subject to the implied immunity of States from suits by individuals, so as to reach only those cases where a State was a plaintiff or waived its immunity.

The broad language of the clauses in question contains no such limitation; nevertheless, this is exactly the construction given to the equally broad clauses of the same section that extend the judicial power to "controversies to which the United States shall be a party" and to "all cases affecting ambassadors, other public ministers and consuls." Despite this broad language, the Court has recognized the United States' immunity from suit at least since United States v. McLemore, 4 How. 286 (1846); and no one, to Pennsylvania's knowledge, has ever suggested seriously that Article III abrogated diplomatic immunity.[7]

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[7]This also answers the argument, made most elaborately in the amicus brief of the Chemical Manufacturers Association, that States are not immune from suits that present federal questions. Br. of Chem. Manu. Ass'n., p. 10-16. Neither the United States nor diplomats lose their immunity in such cases, and it is hard to see why the States should.

Nothing in Article III precludes a similiar construction for cases involving the States, and indeed it is difficult to see why these similar clauses should not receive similar constructions.

2. During the debates on the ratification of the Constitution, Madison, Marshall and Hamilton all espoused the construction just discussed. Madison:

> [Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.



3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861). Marshall:

> I hope that no gentleman will think that a state will be called at the bar of the federal court.... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.

Id., at 555. Hamilton:

> It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual <u>without its consent</u>.

The Federalist No. 81, p. 511 (B. Wright ed. 1961)(emphasis in original). These assurances, given in response to fears that the new federal courts would saddle the debt-heavy States with treasury-breaking liabilities, may well have been essential to the Constitution's ratification. Welch, supra, slip op. at 13-14.

3. Only six years after ratification, the Court, in Chisholm v. Georgia, 2 Dall. 419 (1793), rejected the view advanced by Madison, Marshall and Hamilton, and held that a private citizen could indeed drag a State before the federal courts. "The reaction to Chisholm was swift and hostile.... Within two years of the Chisholm decision, the Eleventh Amendment was ratified...." Welch, supra, slip op. at 14-15.



4. The Eleventh Amendment passed through Congress with little debate or dissent, but one incident deserves comment. The Senate rejected an amendment, offered by Senator Gallatin, that would have excepted from the Eleventh Amendment's bar "cases arising under treaties made under the authority of the United States." 4 Annals of Cong. 30 (1794).

The rejection of Gallatin's amendment refutes the suggestion that the Eleventh Amendment does not bar suits that are based upon the existence of a federal question. The federal government's interest in cases that arise under treaties, having as they do the potential to embroil the nation in international disputes, is even greater than its interest in cases arising under the federal Constitution or statutes.

See The Federalist, No. 22, p. 197-98; No. 80, 500-01 (B. Wright ed. 1961). It therefore would be bizarre to suppose that the federal courts are empowered to entertain the latter but not the former. And it would be still more bizarre to suppose that the federal courts, barred from hearing federal-question actions brought against a State by citizen of other States, may nevertheless hear them when brought by a State's own citizens.

* * *

The text of the Constitution, the contemporary understanding of it at the time of ratification, the reaction to Chisholm, and the circumstances surrounding the adoption of the Eleventh Amendment--all support, if they do not compel, the conclusion that Hans was correctly decided. Certainly, nothing



in the historical record compels the conclusion that it was not. Union Gas and its amici have simply failed to carry the heavy burden laid on them by stare decisis. See Welch, supra, slip op. at 9.

### B. Hans, Far From Having a "Pernicious" Effect, Embodies A Vital Principle of Federalism

Despite the inadequacy of the evidence that Hans was incorrectly decided, Union Gas and its amici insist that Hans nevertheless should be overruled because it is "pernicious." Br. for Resp., p. 25. The ill effects of Hans are said to be two-fold: 1) Hans is said to be doctrinally unsound, spawning "a raft of legal fictions" that

have no principled basis; and 2) Hans enshrines the concept of sovereign immunity, which is said to be outmoded and unjust. Br. for Resp. p. 23-24. Again, they are wrong on both counts.

1. The charge of doctrinal incoherency is not only untrue but irrelevant. Union Gas, its amici and their academic supporters have forgotten that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). There is perhaps no area of the law where Holmes' celebrated epigram is so apt.

The hallmark of the Court's Eleventh Amendment jurisprudence is not a finicky intellectual tidiness but the practical accommodation of the competing state and national interests that are inherent in our federal system. Within



this framework, the long line of decisions that follow Hans have developed a stable and predictable body of doctrine that is responsive to these competing interests. Thus, the federal courts may order state officials to conform their future conduct to the requirements of federal law--a power necessary to vindicate the "supreme authority of the United States," Ex parte Young, 209 U.S. 123, 160 (1908), but may not grant relief that would expend itself against a State's treasury, Edelman v. Jordan, supra--a prohibition which is directly reponsive to the fears expressed in the ratification debates and which, when fulfilled in Chisholm, led to the adoption of the Eleventh Amendment. On the other hand, and in contrast to a Young-type case, a request for an order

that a state official conform his or her conduct to state law implicates no federal interest, and the Eleventh Amendment therefore bars such an action. Pennhurst State School & Hospital v. Halderman, supra, at 104-106.[8]

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[8]Other aspects of the Eleventh Amendment doctrine, and the ways in which they respond to the needs of our federal system, were summarized by Justice Powell in the plurality opinion in Welch, supra:

> The contours of state sovereign immunity are determined by the structure of requirements of the federal system.... First, the United States may sue a State, because that is "inherent in the Constitutional plan." Absent such a provision, "the permanence of the Union might be endangered.'" Second, States may sue other States, because a federal forum for suits between States is "essential to the peace of

(FOOTNOTE CONTINUED ON NEXT PAGE)



To the extent that this body of doctrine includes legal fictions or anomalies--and that extent is much less than Union Gas would have the Court believe--they are anomalies that are

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(FOOTNOTE CONTINUED)

> the Union." Third, States may not be sued by foreign states, because "[c]ontroversies between a State and a foreign Sate may involve international questions in relation to which the United States has a sovereign prerogative." Fourth, the Eleventh Amendment established "an absolute bar" to suits by citizens of other States or foreign States. Finally, "[p]rotected by the same fundamental principle [of sovereign immunity], the States, in the absence of consent, are immune from suits brought against them by their own citizens...."

Welch, supra, slip op. at 17-18 (citations omitted).

inherent in our federal system of dual sovereignty, which is itself an anomaly if one chooses to look at it that way. Its virtue is not its academic rigor, but its practical success in preserving for two centuries the liberties of a free people by diffusing the power of government.

2. Union Gas' attack on sovereign immunity is equally misconceived. It rests ultimately on the proposition that allowing injured persons to sue for compensation is not merely a good thing, but is an overriding value of such transcendent importance that it deserves to be enshrined as constitutional doctrine.

Only a moment's thought is necessary to dispel this fallacy. There are any number of areas where competing



social values outweigh the need for compensation, producing immunities of one kind or another. E.g., United States v. McLemore, supra (sovereign immunity); Imbler v. Pachtman, 424 U.S. 409 (1976)(prosecutorial immunity); Stump v. Sparkman, 435 U.S. 349 (1978) (judicial immunity); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (presidential immunity); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (executive branch immunity); Hustler Magazine v. Falwell, No. 86-1278 (February 24, 1988)(First Amendment immunity).

In the same way, the immunity exemplified by the Eleventh Amendment embodies one of the most fundamental values of our system of government:

> a recognition of the fact that the entire country is made up of a Union of separate state governments,

> and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

C. Overruling Hans Would Itself Prove "Pernicious."

Far from providing the "salutory" effects foreseen by Union Gas, Br. for Resp., p. 23, overruling Hans would do enormous damage to the life of the nation. First and most importantly, it would, by exposing States to unlimited liability at the will of Congress, further erode the diffusion of power on which the preservation of liberty ultimately rests. In The Federalist, No. 51, Madision wrote that:



> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id., at 357 (B. Wright ed. 1961). As Justice Scalia recently reminded, "[t]he framers of the Federal Constitutional...viewed the principle of separation of powers as the absolutely central guarantee of a just government....Without a secure structure of separated powers, our Bill of Rights would be worthless...." Morrison v. Olson, No. 87-1279 (June 29, 1988),

slip op. at 1 (Scalia, J., dissenting). The further centralization which Union Gas calls for can only weaken that structure.

Second, overruling Hans would produce enormous confusion and uncertainty. Congress, the States and the Court have relied on Hans for a century. Overruling Hans would not only call into question at least 17 subsequent decisions of the Court, Welch, supra, slip op. at 24-25, n. 27, but would throw the States into fiscal chaos as they attempt to cope with the flood of claims such a ruling will produce.

Third, the doctrinal instability produced by overruling Hans will not be confined to the area of the Eleventh Amendment. As Pennsylvania discussed



above, supra at 15-17, it is impossible to accept the arguments for overruling Hans without at the same time calling into question the United States' own sovereign immunity. Welch, supra, slip op. at 15-16, n. 17. Finally, to the extent that the Court accepts and constitutionalizes Union Gas' argument that immunity is a "pernicious" doctrine, it will undercut not just the States' immunity, but all of the other forms of immunity discussed, supra, at 28.

## III. CONGRESS, ACTING UNDER THE COMMERCE CLAUSE, MAY NOT UNILATERALLY ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

In arguing that Congress has unlimited power to abrogate the States' Eleventh Amendment immunity, irrespective of State consent or waiver, Union Gas does not argue that Pennsylvania has consented, either actually or constructively, to private lawsuits under CERCLA. See Br. for Pet., p. 43-46; Pa. Cons. Stat., tit. 42, § 8521(b) (expressly preserving Eleventh Amendment immunity). Nor does Union Gas attempt to deny that its argument, if accepted, would simply eliminate the Eleventh Amendment as a meaningful part of the Corstitution. Br. for Pet., p. 32-35. Rather, Union Gas relies primarily on the idea that



the inability of the federal courts to entertain private actions against unconsenting States, somehow eviscerates Congress' ability properly to regulate interstate commerce.[9]

On one level, of course, this argument simply begs the question, Welch, supra, slip op. at 18; on another level, it is simply absurd. Congress does not lack means to induce or coerce States to cooperate in its regulatory schemes. See, e.g., South Dakota v. Dole, No. 86-260 (June 23, 1987); FERC v. Mississippi, 456 U.S. 742 (1982). In

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[9]Union Gas also argues that the Court has already settled the question of Congress' power to abrogate the Eleventh Amendment when acting under the Commer Clause, Br. for Resp. p. 25-28, but this is clearly incorrect. Welch, supra, slip op. at 6; see Br. for Pet., p. 28-31.

CERCLA itself, Congress has required that States pay a significant share of cleanup costs as a condition of federal invovlement. Supra at 8-9. Suits against States by the United States, or agianst State officials by private parties, Edelman v. Jordan, supra, provide further weapons aginast recalcitrant States.

What is at stake here, then, is not the vindication of Congressional authority but the desire of private parties to use the federal courts to gain entry to the ultimate "deep pockets," the State treasuries. To gain that entry, they would have the Court effectively scrap the Eleventh Amendment. The Court should reject their invitation.



## CONCLUSION

For the foregoing reasons, Pennsylvania asks the Court to reverse the judgment of the Court of Appeals.

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